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No. 91-1748

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MALCOLM PIRNIE, INC.,
Petitioner,
v.
LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 200,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional organizations in the United States.

A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of important labor relations litigation before this Court.[2]

This case raises important issues regarding the U.S. Department of Labor's ("DOL") "salary basis" test which is used to determine whether executive, administrative, and professional employees are exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. §§ 201, *et seq.* The precise question presented is whether current DOL Interpretive Regulations, issued pursuant to Section 13(a)(1) of the FLSA, 29 U.S.C. § 213(a)(1), should be construed to prevent an employer from correcting a minor and technical deviation from the DOL's salary requirements.

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.2. Letters of consent are on file with the Clerk of Court.

[2] E.g., *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

So construed, an employer would be required to pay large amounts of "overtime" to highly-paid executive, administrative, and professional employees who would otherwise be exempt from the Act's coverage. The question arises from the Second Circuit's contorted reading of the so-called "window of correction" that appears in DOL's salary regulations, and which on its face allows the correction to be made.

This question is of vital concern to the Chamber and its members, many of whom employ large numbers of salaried individuals who are highly paid and regularly perform the duties of executive, administrative, and professional employees. If the Second Circuit's restrictive view of the pertinent DOL regulatory scheme is allowed to prevail, then significant numbers of executive, administrative, and professional employees who otherwise would be considered exempt from the overtime provisions of the FLSA will be entitled to enormous sums of unpaid overtime. The Chamber and its members, therefore, are concerned that the policies and purposes of the Act not be undermined, and that private sector pay systems not be thrown into disarray by an erroneous interpretation of DOL's regulatory scheme, which itself is of questionable validity.

SUMMARY OF THE CASE

A. Section 13(a) of the Fair Labor Standards Act of 1938 provides an exemption from the Act's minimum wage and overtime requirements for "any employee employed in a bona fide executive, administrative, or professional capacity . . . as such terms are defined and delimited from time-to-time by regulations of the Secretary [of Labor]." 29 U.S.C. § 213(a)(1) (1988). The Department of Labor's current Regulations, issued pursuant to Section 13(a), require that executive, administrative, and professional employees not only satisfy specified "duty" requirements in order to be exempt from the Act's coverage, but also require that they be paid on a "salary or fee basis." 29 C.F.R. §§ 541.1-3 (1991). The Regulations further state, in § 541.118(a), that "[a]n

employee will be considered to be paid 'on a salary basis' . . . if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount . . . which amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked."

Five such "exceptions" are then set forth in the Regulations, two of which are particularly pertinent here. The first, in § 541.118(a)(2), allows deductions to be made from the pay of salaried employees for personal absences from work of a day or more. The second pertinent exception, in § 541.118(a)(6), and frequently referred to as the "window of correction," states:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available. it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

It is the Second Circuit's restricted reading of the "window of correction" in § 541.118(a)(6) that is directly in issue in this case.

B. Petitioner Malcolm Pirnie is an engineering consulting firm that employs more than 900 employees throughout the United States. Malcolm Pirnie performs a majority of its work for government contractors. Approximately 400 engineers, architects, scientists, supervisors, accountants, and administrators work for Malcolm Pirnie. They are placed in Salary Grades 6-9 of an 11

grade salary system, and are paid salaries of between $30,000 and $70,000 per year. Employees receive a fixed salary every two weeks. Although Malcolm Pirnie considers employees in Grades 6-9 to be exempt, employees in Grades 6-8 are paid time and one-quarter, and employees in Grade 9 are paid straight time, for all hours worked in excess of 40 hours per week.

Until 1988, Malcolm Pirnie issued a handbook to all employees that stated that deductions from pay would be made for absences in amounts of less than a day. Although the handbook ostensibly applied to all employees, the district court concluded that the policy was never intended to apply to employees in Grades 6-9, and that it was not Malcolm Pirnie's policy to make such deductions for exempt employees. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. 899, 908 (S.D.N.Y. 1991). Notwithstanding its policy, Malcolm Pirnie discovered that 24 employees out of the 376 employees in Grades 6-9, over an eighteen month period, had recorded absences without leave for periods of less than a day for which a total of $3,269 had been deducted from their salaries. Malcolm Pirnie reimbursed the 24 individuals for the deductions, and clarified the company's policy regarding part-day deductions by amending the language of its handbook and by specifically instructing employees in Grades 6-9 to charge part-day absences to a new account entitled "Paid Absence."

C. After an investigation of Malcolm Pirnie's pay practices by DOL, the Secretary of Labor instituted a lawsuit in May, 1989 in which she alleged that all Malcolm Pirnie's employees in Grades 6-9 were not exempt because their salaries were subject to part-day deductions. Malcolm Pirnie denied the allegation, claiming that its employees in Grades 6-9 were exempt executive, administrative, and professional employees within the meaning of § 13(a) of the Act and §§ 541.1-3 of the DOL regulations.

The district court granted Malcolm Pirnie's motion for summary judgment, rejecting the Secretary's contention

that the overtime exemption of the FLSA had been lost because part-day deductions had been made from the salaries of the 24 otherwise exempt employees. Although the district court impermissibly read the "window of correction" as requiring that deductions be "inadvertent" *and* for "reasons other than lack of work," the court nevertheless concluded that Malcolm Pirnie's reimbursement of the employees and its clarification of company policy satisfied the essential requirements of 29 C.F.R. § 541.118(a)(6). *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. 899, 905-908 (S.D.N.Y. 1991).

The Second Circuit reversed the district court, holding that all of Malcolm Pirnie's executive, administrative, and professional employees in Salary Grades 6-9 were not paid on a "salary basis" because deductions from pay for lost time were made in increments of less than a day from the salaries of the 24 employees. The Court refused to allow Malcolm Pirnie to take advantage of § 541.118(a)(6)'s "window of correction" because, in the Court's view, the deductions that were made were not "inadvertent," and because other employees who did not have deductions made nevertheless were "subject to" impermissible deductions. Without mention of the language of the "window of correction" that permits the reimbursement of deductions "made for reasons other than lack of work," the Second Circuit effectively closed the "window" altogether by requiring that impermissible deductions be not only "inadvertent," but also "one-time or unintentional." *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 616-617 (2d Cir. 1991).

As a result of the Second Circuit's decision, Malcolm Pirnie must pay otherwise exempt employees $500,000 for overtime work.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

In support of its Petition, Malcolm Pirnie has shown that the Second Circuit misconstrued the "window of correction" contained in § 541.118(a)(6) and that the

Second Circuit's opinion conflicts with the views of the Fourth Circuit. Although we do not reiterate Petitioner's arguments here, we do present additional support for Petitioner's contention that the Second Circuit misconstrued the "window of correction," and we set forth other compelling reasons why the Petition should be granted. First, however, in order to set forth the Second Circuit's erroneous decision in its true perspective, we detail the uneven and enigmatic administrative history accorded the term "salary basis" by the DOL.

I. THE DOL'S INTERPRETATION OF THE TERM "SALARY BASIS" HAS BEEN NEITHER CONSISTENT NOR EXPLAINED.

DOL has accorded the term "salary basis" inconsistent and unexplained meanings since shortly after the FLSA was enacted in 1938. In 1940, the Administrator of the Department of Labor's Wage and Hour Division ("the Administrator") issued the first Regulations pursuant to the Secretary's empowerment under Section 13(a) of the Act, stating that to qualify for the exemption, executive employees, among other requirements, had to be "compensated for [their] services on a salary basis at not less than $30 per week;" and that professional and administrative employees, among other requirements, had to be "compensated for [their] services on a salary or fee basis at a rate not less than $200 per month." The Regulations were silent, however, as to the meaning of the phrase "compensated on a salary basis." 5 Fed. Reg. 4077 (Oct. 15, 1940), *codified at* 29 C.F.R. §§ 541.1(e), 541.2(a), and 541.3(b) (Supp. 1940 revision).

Subsequent pronouncements by the Department of Labor as to the meaning of the "salary basis" phrase have been less than elucidative. In 1944, the Wage and Hour and Public Contracts Divisions announced that:

> since it is well recognized that bona fide executive, administrative and professional employees are normally allowed some latitude with respect to the time spent at work, an employee will not be regarded as being paid on a salary basis if deductions are made

> for those types of absences ordinarily allowed such employees. For example, an employee is not being paid on a salary basis, if the employer makes deductions from his salary for an afternoon *when he goes home early or when he occasionally takes a day off*, unless, under the circumstances of a particular case, such absences must be considered unreasonable (emphasis added).

Release A-9, August 24, 1944, "Payments on 'Salary Basis' for Executive, Administrative and Professional Employees Clarified," 1944-1945 WH Man (BNA) 719. From this it is clear that as early as 1944 the Department of Labor did not differentiate between docking the salaries of executive, administrative or professional employees for absences of part of a day and docking their salaries for absences of an entire day. Both actions were impermissible.[3]

In December 1949, following a rule-making proceeding,[4] the Administrator issued two documents which amended and interpreted the DOL Regulations pertaining to Section 13(a)(1) of the Act. The first document revised the Regulations previously issued, designated the revised Regulations as "Subpart A—General Regulations," and, *inter alia*, raised the minimum amounts of compensa-

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[3] Inconsistently, in 1945, in response to an inquiry, the DOL Wage and Hour Division stated that the salary requirements of the executive and administrative exemptions were satisfied where salary deductions were taken for each day or a part of a day that employees were absent, provided that the deductions did not reduce the employees' earnings below the minimum salary requirements of the applicable exemption. 1944-1945 WH Man. (BNA), 727.

[4] A Notice of Hearing concerning, *inter alia*, "the need for revision or definition" of the Regulatory terms "salary basis" and "salary and fee basis" was published in the Federal Register on October 22, 1947. 12 Fed. Reg. 6896, (1947). Subsequently, after a hearing had been held and a hearing Report had issued, the Administrator published in the Federal Register a Notice of Proposed Revised Regulations. 14 Fed. Reg. 5573 (Sept. 10, 1949). Then the Administrator issued the documents described in the above text.

tion that had to be paid ("on a salary basis," or "on a salary or fee basis") to exempt executive, administrative, and professional employees. 14 Fed. Reg. 7705, 7707 (Dec. 24, 1949), *codified at* 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1950 revision). The second document contained a new "Subpart B—Interpretations" which set forth "statements of general policy and interpretations directly related to" Subpart A's General Regulations. 14 Fed. Reg. 7730 (Dec. 28, 1949), *codified at* 29 C.F.R. §§ 541.100-541.600 (1950 revision). One such interpretation, in § 541.118(a), provided:

> An employee will be considered to be paid on a salary basis within the meaning of the regulations in Subpart A of this part, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked in the workweek or in the quality or quantity of the work performed. The employee must receive his full salary for any week in which he performs any work *without regard to the number of days or hours* worked.

Id. at 7735 (1949), *codified* at 29 C.F.R. §§ 541.100-541.600 (1950 revision) (emphasis added). Thus, in 1949, the Administrator adhered to the 1944 interpretation, making it impermissible to dock weekly salaries for absences of any duration—*i.e.*, whether for part of a day or for an entire day.

The latter remained the official DOL interpretation of the term "salary basis" until 1954. On March 9 of that year, a Notice in the Federal Register announced that the Administrator "propose[d]" to amend the DOL's "salary basis" interpretation (29 C.F.R. § 541.118(a)) in a number of respects. The Notice set forth the text of the proposed amendments, gave interested persons 30 days in which to submit written statements regarding the proposals, but set forth nothing whatever explaining the proposed amendments or describing the reasons, or reas-

oning, supporting them. 19 Fed. Reg. 1321. Then, on July 17, 1954, the Administrator announced the adoption, verbatim, of all such proposed interpretative amendments except for one provision not pertinent here. 19 Fed. Reg. 4405 (1954), *codified at* 29 C.F.R. § 541.118(a) (1955). But, again, the Administrator provided no explanation for the changes or the reasons, or reasoning, supporting them. The amended interpretative Regulation, 29 C.F.R. § 541.118(a) (1955), has not been changed since 1954 and is the administrative regulation involved in this case.

The 1954 interpretative amendments continued the requirement of § 541.118(a) that an employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked, but made the requirement subject to a number of specific exceptions. One such exception is the "window of correction" (29 C.F.R. § 541.118(a)(6) (1991)), the text of which is reproduced *supra*, p. 3. Another of the exceptions, that set forth in § 541.118(a)(2) and referred to *supra*, p. 3, states in full:

> Deductions may be made . . . when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

Thus, under the presently applicable interpretation, the statutory exemption is not forfeited by an employee who is absent from work for personal reasons during an entire day of 8 hours, but the exemption is forfeited by an employee who, for the same reasons, is absent for any period less than 8 hours, say, 7 or 7½ hours. On its face, this distinction, if not clearly discriminatory, makes little sense. Moreover this regulatory distinction was prescribed by the Administrator without an explanatory statement of any sort, and it followed a period of

some 16 years in which a contrary interpretation was, for the most part,[5] controlling.

In view of its administrative history, the DOL's present "salary basis" test would, if subjected to judicial review under the Administrative Procedure Act's "arbitrary and capricious" standard (5 U.S.C. § 706(2)(A) (1988)), almost certainly be found defective. This is so because the DOL has set forth neither findings, nor analysis, nor explanation to justify the about-face encompassed by the 1954 regulatory change distinguishing between full-day and partial-day absences.[6]

With respect to the petition before the Court, it is highly significant that there is nothing in the administrative history of the DOL Regulations that indicates that the "window of correction" should be read in any way other than as written. The Second Circuit's strained reading of the provision is all the more egregious, therefore, not only because it lacks support in the administrative history, but also because it results in the upholding of a salary requirement which, as shown by the administrative history, is itself of dubious validity.

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[5] *See* note 3, *supra*.

[6] Under the Administrative Procedure Act's "arbitrary and capricious" standard, it is well-settled that "an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Assoc. of the United States, Inc. v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 41, 48 (1983); *Bowen v. American Hospital Association*, 476 U.S. 610, 626-627 (1986); *Federal Communications Comm'n v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 802-803 (1978); *Natural Resources Defense Council v. Environmental Protection Agency*, 824 F.2d 1258, 1282, 1293 (1st Cir. 1987). The requirement is especially important where an agency "choos[es] to alter its administrative course." *Action for Children's Television v. F.C.C.*, 821 F.2d 741, 745 (D.C. Cir. 1987).

II. THE SECOND CIRCUIT MISREAD THE PLAIN LANGUAGE OF § 541.118(a) AND UNDULY RESTRICTED APPLICATION OF THE WINDOW OF CORRECTION.

The Second Circuit misread the plain language of § 541.118(a)(6) in two respects. First, the court concluded that the "window of correction" only allows reimbursement of inadvertent, one-time or unintentional deductions. 949 F.2d at 616. Secondly, the court failed to address, or apparently even to consider, the second half of the "window" that allows reimbursement of deductions "made for reasons other than lack of work." 29 C.F.R. § 541.118(a)(6).

The language of the "window" is straightforward. An employer may preserve the exemption by reimbursing employees for impermissible deductions that were inadvertent, *or* that were "made for reasons other than lack of work." Although the precise meaning of the term "made for reasons other than lack of work" is not at first apparent, the clause should be read in the context of the entire Section. Read in that light, the meaning of the phrase becomes clear. Subsection (4) of § 541.118(a) explicitly, and subsections (2), (3), and (5) by implication, refer to impermissible deductions from an employee's salary.[7] The deductions thus prohibited consti-

[7] In pertinent part, § 541.118 states:

(a) * * *

(1) * * *

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. . . .

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary

tute deductions for "reasons other than lack of work," and therefore the "window" permits reimbursement of all such deductions. Accordingly, an employer who makes the required reimbursement, and who also promises to discontinue making impermissible deductions in the future, satisfies the "salary basis" test, and preserves the overtime exemption.

DOL has asserted that such a reading of the "window" is too broad, and that it provides latitude for an employer to abuse the salary requirements of § 541.118(a). *See Dole v. Malcolm Pirnie, supra,* 758 F. Supp. at 904. DOL, however, is responsible for having drafted the Section's language, and therefore, the language should be given its plain and ordinary meaning. If DOL did not intend the language to be read as written, then the language should be withdrawn and revised. Critically, the failure of the Second Circuit to read the language as written erroneously precluded Malcolm Pirnie from correcting deductions clearly encompassed within the language of § 541.118(a)'s "window of correction."

III. DOL HAS APPLIED ITS SALARY BASIS TEST INCONSISTENTLY BETWEEN PUBLIC AND PRIVATE EMPLOYERS.

The degree of error in the Second Circuit's reading of the "window of correction" is heightened by the fact that DOL applies the "salary basis rule" and "window" differently to private employers than to public employers. Since January 1987, eight months after the FLSA became applicable to public employers, DOL has allowed public

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military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

employers to make part-day deductions from the salaries of otherwise exempt employees, notwithstanding the requirements of § 541.118(a). Moreover, DOL has provided little or no explanation for this disparate application of the "salary basis" rule, and has cited no evidence to support its position that private sector pay systems are different from public sector pay systems.

In 1974, Congress extended coverage of the FLSA to public employers for the stated purpose of ensuring consistency in the application of the minimum wage and overtime laws between private and public employers. H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. at 28 (1974), *reprinted* in 1974 U.S.C.C.A.N. 2811, 2837. Subsequently, after some eleven years in which the extension was not enforced,[8] Congress, in 1985, further amended the FLSA to provide: "No state . . . shall be liable under Section 16 of the Fair Labor Standards Act of 1938 for a violation of such Act occurring before April 15, 1986. . . ." Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(c), 99 Stat. 788 (1985). The purpose of the amendment delaying application of the FLSA to the states was set forth in the Senate Report:

> The Committee has deferred application of the FLSA overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities.

S. Rep. No. 99-159 at 15, 99th Cong., 1st Sess. 2 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 663. Significantly

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[8] In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court held that Congress had exceeded its authority in extending the FLSA to the states. *National League of Cities* was overruled, however, in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Congress' 1985 amendments to the FLSA were in response to the Court's decision in *Garcia*, and were designed to delay the impact of the decision. *See* text, this page. *See also Blanton v. City of Murfreesboro*, 856 F.2d 731 (6th Cir. 1988) (discussing post-*Garcia* amendments to FLSA); *Rhinebarger v. Orr*, 839 F.2d 387 (7th Cir. 1988), *cert. denied*, 488 U.S. 824 (1989) (same).

here, when the 1985 Amendment was under consideration, Congress reiterated its 1974 goal of providing consistency between private sector and public sector wage requirements. *Id.*

In January 1987, after numerous suits were brought by public employees for unpaid overtime, the Secretary of Labor adopted a new enforcement policy regarding the "salary basis" requirements of public employers under §§ 541.1-3. Thenceforth, DOL would not enforce the docking prohibitions of § 541.118(a) against public employers if the public employer in question was required by law to pay employees only for time worked.[9] DOL Field Operations Handbook, Chp. 59d (1989). DOL did not explain, however, how its new enforcement policy affecting public employers was compatible with its published "salary basis" requirement, or why a similar enforcement policy should not be made applicable to private employers.

Then, in the fall of 1991, DOL did a complete turnabout in its interpretation of the salary rule for public employers. On September 6, 1991, the Secretary promulgated a new Interim Final Rule which preserves the salaried status of public employees who otherwise satisfy

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[9] This policy did not affect the right of individuals employed by public employers who had been docked for part-day absences to bring their own actions under § 16(b) of the FLSA. 29 U.S.C. § 216(b) (1988). Certain courts, however have denied the overtime claims. For example: *Keller v. City of Columbus, Ind.*, 778 F. Supp. 1480 (S.D. Ind. 1991); *Hartman v. Arlington County, Va.*, 720 F. Supp. 1227, 1232 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990); *International Assoc. of Fire Fighters, Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd.*, 912 F.2d 463 (1990); *Sarver v. Roanoke*, 29 Wage & Hour Cas. (BNA) 1442, 1444 (W.D. Va. 1989); *Harris v. District of Columbia*, 709 F. Supp. 238, 241 (D.D.C. 1989); *District of Columbia Nurses Assn. v. District of Columbia*, 29 Wage & Hour Cas. (BNA) 868, 869 (D.D.C. 1988). Other courts have awarded overtime pay. *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785 (1991); *Service Employees Int'l Union, Local 102 v. County of San Diego*, 784 F. Supp. 1505, 1511-1512 (S.D. Cal. 1992); *Knecht v. City of Redwood City*, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987).

the requirements of § 541.118(a), even if their employers have a policy of making pay deductions for absences of *less* than one day. 56 Fed. Reg.. 45824 (Sept. 6, 1991).[10] In addition, on the same day, the Secretary proposed a new, less restrictive "window of correction" for the benefit of public sector employers only. 56 Fed. Reg. 45828 (Sept. 6, 1991). Under the proposal, there would be no requirement that part-day deductions from the pay of public employees be "inadvertent" or "made for reasons other than lack of work."[11] The only limitation in the

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[10] The Interim Final Rule appears as an addition to 29 C.F.R. § 541 and states (56 Fed. Reg. at 45826):

> § 541.5d Special Provisions Applicable to Public Sector Employers (Federal, State and Local Governments)
>
> (a) A Federal, State or local government employee ("public employee") who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 of this part on the basis that such employee is paid according to a pay system established by statute, ordinance, regulation or public policy under which the employee accrues personal leave and sick leave and, absent the use of such accrued leave (because the leave has been exhausted or by the employee's choice), requires the public employee's pay to be reduced ("leave without pay") for absences, for personal reasons or because of illness or injury, of less than one work-day.
>
> (b) Deductions from a public employee's pay that are not regular and recurring for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" except in the workweek in which such deductions occurred.

[11] The proposed regulatory change would renumber § 541.118 (a)(6) as (a)(6)(i) and add a new paragraph 541.118(a)(6)(ii) to read as follows (56 Fed. Reg. at 45830):

> § 541.118 Salary Basis
>
> (a) * * *
>
> (6) * * *
>
> (ii) If a Federal, State or local government (i.e., public sector) employer's pay system is as described in § 541.5d, and either:
>
> (A) The public employer has made no actual deductions from the pay of otherwise-exempt public employees for absences, for personal reasons or because of illness or injury, of

proposal is that deductions would have to have been reimbursed prior to September 6, 1991.[12]

In explaining its proposed changes, DOL stated conclusorily that "public pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems." 56 Fed. Reg. at 45829. DOL did not comment on the regulatory consistency between the private and public sectors which the Congress was seeking in 1974, and again in 1985, by extending FLSA coverage to public sector employees. Nor did DOL explain why the interests it sought to protect in public sector pay systems—accountability for monies spent, time paid for time worked—are in fact different from the interests which private employers seek to protect in their pay systems.

The irrationality of DOL's salary docking prohibition for private employers in § 541.118(a) is made plain by its proposed Interim Final Rule for public employers. An

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less than one work-day before the effective date of § 541.5d (i.e., September 6, 1991); or

(B) The employer reimburses any otherwise exempt public employees for deductions from salary that were made for absences, for personal reasons or because of illness or injury, of less than one work-day occurring before the effective date of § 541.5d (i.e., September 6, 1991);

then eligibility for exemption for public employees who otherwise meet the requirements of § 541.118 and who were subject to pay system will not be defeated for failure to pay "on a salary basis."

[12] Although the comment period with respect to the proposed new rule for public sector employees ended on October 7, 1991, DOL has made no further pronouncement about it. Further, the rule has been cast in doubt by a district court which held that DOL did not comply with the notice and comment requirements of the Administrative Procedure Act ("APA"). *Service Employees Int'l Union, Local 102 v. County of San Diego*, 784 F. Supp. 1503, 1512 (S.D. Cal. 1992). Whether or not the district court is correct regarding its APA concerns, it is interesting to note that the court was skeptical of DOL's treatment of the overtime issue in its proposed rule in light of Congress' extensive consideration of the public employer matter in 1985.

employee's salary status should not turn on the mere identity of his employer. In the instant case, where Malcolm Pirnie performs the majority of its work for public entities, its interests in fashioning a pay system based on accountability and compensation for time worked are identical to those of the public employers for whom it performs services.

IV. THE SECOND CIRCUIT'S DECISION UNDERMINES MANY PRIVATE SECTOR PAY SYSTEMS AND DISCOURAGES THE APPLICATION OF OBJECTIVE PAY STANDARDS.

The Second Circuit's unduly restrictive reading of the "window of correction" widens the impact of regulatory prohibitions that are inconsistent with pay systems utilized by many large employers in the United States. As noted above, private employers have the same interests in accountability and in compensation for time worked as public employers. In particular, employers that do business with federal, state and local governments usually must satisfy the same accounting standards as the public entities themselves. Accordingly, many such employers have adopted pay systems that are compatible with governmental systems and which allow them to qualify for public work, but which, arguably, would be invalid under the Second Circuit's decision.

The Second Circuit's decision also beclouds many pay practices followed by United States employers. Some employers require their salaried executive, administrative and professional employees to take deductions from special leave accounts for employee absences of less than a day, even though the individual's pay remains intact. The Ninth Circuit has suggested that such a practice fails to satisfy the requirements of § 541.118(a). *Abshire v. County of Kern*, 908 F.2d 483, 487 n.3 (9th Cir. 1990). *Accord: Service Employees Int'l Union, Local 102 v. City of San Diego*, 784 F. Supp. 1503, 1510 (S.D. Cal. 1992). *Cf. York v. City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); Administrative Letter Rulings:

U.S. Department of Labor, Wage & Hour Division, July 17, 1987.

Other employers have a practice of making a pay deduction for increments of less than a day if the absence is in connection with a full day's absence. For example, if an employee is absent for one and a half days, and the employee has utilized all of his leave, a deduction is made from pay in the amount of one and one-half days. Employees of some employers receive vacations in one-half week increments. If an employee who is entitled to a vacation of two and one-half weeks, or 17½ days, decides to take a full 18 days, then a reduction in pay for the additional half day absence usually is made. In such a circumstance, DOL would take the position—presumably endorsed by the Second Circuit—that all employees who are subject to such a deduction would lose their exemption for failing to satisfy the salary requirement.

It also is not uncommon for employers to make salary deductions for part day absences by otherwise exempt employees who are in their first six months of employment and who have not yet accrued leave benefits. Again, under the Second Circuit's holding in this case, such employees would no longer be deemed exempt.

The Second Circuit's restrictive reading of the salary requirements in § 541.118(a) also forecloses the utilization of objective pay practices by private sector employers. A private sector employer who, in the interest of equal treatment of all employees, adopts an objective, uniform policy requiring that all employees account for absences of less than a day runs the risk that his executive, administrative, and professional employees will lose their exemptions under the Act. It does not matter if the employer adopts the policy because he is required to do so as a government contractor, or if the employer does so as a sound business practice. The result is the same—salaried employees would lose their exemption and payment for overtime would be compelled.

Further, if an employer believes that a salaried employee has abused an existing privilege of not being docked for partial day absences, the employer, under the Second Circuit's decision, could not provide an incentive for improved performance by instituting a docking policy. Rather, the employer would be required to tolerate the lost time or terminate the employee outright. In addition, the inability to promulgate a uniform pay practice which allows for such partial day deductions inevitably results in supervisors and managers of the same employer applying varying standards of tolerance with regard to such absences. One supervisor may take a fairly relaxed view, not wanting to subject employees to potential discharge for excessive part day absences for which they were paid; another supervisor may take a stricter view, and insist on discipline after a single half-day absence.

No responsible employer can tolerate such subjective, and potentially discriminatory, practices. In different contexts many employers who have relied on *ad hoc*, subjective employee selection procedures have ended-up shouldering a substantial burden in subsequent litigation when required to justify or explain their employment decisions. *See*, for example, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (particular selection criteria having disparate impact on protected group constitutes discrimination under Title VII unless justified by business necessity); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (subjective promotion criteria actionable under Title VII); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (subjective promotion criteria actionable under Title VII because of discriminatory impact); *Harris v. Birmingham Bd. of Educ.*, 712 F.2d 1377, 1383 (11th Cir. 1983) (en banc) (lack of objective hiring criteria a basis of establishing *prima facie* case under Title VII); *Watson v. National Linen Service*, 686 F.2d 877, 881 (11th Cir. 1982) (lack of fixed or reasonably objective hiring standards discriminatory under Title VII); *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1375 (5th Cir. 1978) (same as *Watson* in context

of supervisors' promotion decisions); *Pugh v. See's Candies, Inc.*, 250 Cal. Rptr. 195, 212 (Cal. Ct. App. 1988) (under covenant of good faith and fair dealing in employment contract, subjective criteria unavailable to employer regarding termination decision).

Ironically, therefore, the Second Circuit's efforts to preserve the docking prohibitions contained in § 514.118(a) by restricting the scope of the "window of correction" will discourage the adoption of uniform, objective pay systems by responsible employers who foster sound business practices. As such, the Second Circuit's decision is incompatible with fundamental principles of employment law, and with the policies and purposes of the FLSA.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to grant Petitioner's Writ of Certiorari to the Second Circuit.

Respectfully submitted,

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